Nos. 90-711 & 90-712

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LAWRENCE C. PRESLEY, Individually and on Behalf of Others Similarly Situated,
Appellant,

v.

ETOWAH COUNTY COMMISSION,

ED PETER MACK and NATHANIEL GOSHA, III, Individually and on Behalf of Others Similarly Situated,
Appellants,

v.

RUSSELL COUNTY COMMISSION,

On Appeal from the United States District Court for the Middle District of Alabama

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., IN SUPPORT OF APPELLANTS

JULIUS L. CHAMBERS
CHARLES STEPHEN RALSTON
DAYNA L. CUNNINGHAM
(Counsel of Record)
NAACP Legal Defense
and Educational
Fund, Inc.
99 Hudson Street
16th Floor
New York, N.Y. 10013
(212) 219-1900

Attorneys for Amicus Curiae

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

Nos. 90-711 & 90-712

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LAWRENCE C. PRESLEY, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Appellant,

V.

ETOWAH COUNTY COMMISSION

ED PETER MACK AND NATHANIEL GOSHA, III, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Appellants,

V.

RUSSELL COUNTY COMMISSION

On Appeals from the United States District Court for the Middle District of Alabama

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The NAACP Legal Defense & Educational Fund, Inc. (LDF) respectfully moves the Court for leave to file the attached brief as *amicus curiae* in support of petitioners. The *Presley* appellees have consented to the filing of this brief. The *Mack* appellees have refused to grant consent.

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation established to assist African American citizens in securing their constitutional and civil rights. LDF has had a major role in litigation efforts challenging discrimination in voting.[1]

Given *amicus'* substantial experience in voting rights litigation, it is submitted that the brief will be of assistance

[1]*See, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986). LDF represented the plaintiffs in litigation that resulted in this Court's decision that interpreted amended §2 of the Voting Rights Act, 42 U.S.C. §1973, as amended 1982. Other LDF voting rights cases include: *Chisom v. Roemer*, 59 U.S.L.W. 4696 (U.S. June 18, 1991); *Houston Lawyers Assoc. v. Atty. General of Texas*, 59 U.S.L.W. 4706 (June 20, 1991); *Jeffers v. Clinton*, 730 F.Supp.196 (E.D.Ark 1989), *sum. aff'd* 112 L.Ed. 2d 656 (1991).

to the Court. *Amicus* therefore requests that the motion be granted.

Respectfully submitted,

JULIUS L. CHAMBERS
CHARLES STEPHEN RALSTON
DAYNA L. CUNNINGHAM
(Counsel of Record)
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
99 Hudson Street,
16th Floor
New York, N.Y. 10013
(212) 219-1900

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

Nos. 90-711 & 90-712

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LAWRENCE C. PRESLEY, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Appellant,

v.

ETOWAH COUNTY COMMISSION

ED PETER MACK AND NATHANIEL GOSHA, III, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Appellants,

V.

RUSSELL COUNTY COMMISSION

On Appeals from the United States District Court for the Middle District of Alabama

---

BRIEF AMICUS CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., IN SUPPORT OF APPELLANTS

SUMMARY OF ARGUMENT

In broad terms, this case asks the Court to determine how far a local district court may go in defining the scope of §5 coverage when Congress has granted exclusive jurisdiction over the issue to the District Court of the District of Columbia and the Attorney General. Appellants argue that the court below exceeded its jurisdiction in determining that changes in the fundamental authority of elected officials were too inconsequential to merit §5 review. Amicus argues that in reaching this determination, the court below impermissibly created two exceptions to §5.

First, in deciding that the changes in the authority of elected officials were inconsequential, the court below created a *de minimis* exception to §5 preclearance in violation of the statute's express mandate that all changes, no matter how small, be subject to §5 scrutiny. To effectuate §5's remedial purposes, this Court consistently has upheld this *per se* rule. Moreover, each time the Act has come up for renewal, Congress explicitly has rejected attempts to exclude even minor changes from the reach of §5. Congress' refusal to create exceptions to §5 is based on

its concern that such exceptions will exacerbate continuing lack of compliance by many covered jurisdictions.

Even if there were a *de minimis* exception, the changes at issue in this case would not fall within it. The changes fundamentally altered the authority of elected officials in ways that directly affected the duties that voters elected them to perform. Such changes had clear potential to dilute African American voting strength. This Court long has held that changes that have the potential to dilute African American voting strength are covered under §5.

Second, the court below erred in deciding that reallocations of authority among elected officials only fall within the reach of §5 when they involve changes in the constituencies of those officials. Nothing in *McCain v. Lybrand*, 465 U.S. 236 (1984), this Court's only pronouncement on the issue, supports this narrowing of §5's scope. The disputed changes in this case have a clear potential to discriminate against African American voters. The court below erred in ruling that they were not subject to §5 review.

ARGUMENT

Introduction

Twenty five years ago, Congress enacted the Voting Rights Act to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). The heart of the Act is §5, a rigorous scheme aimed at frustrating the "protean efforts", *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 38 n.6 (1978), of local officials to exclude African Americans from the political process by requiring these officials to seek federal approval, before implementation, of every new voting change enacted in their jurisdictions before such changes are implemented. Now a federal district court seeks to upset §5's well-established enforcement scheme by allowing local district courts, and ultimately local jurisdictions, unprecedented discretion to choose which voting changes have sufficient impact upon the voting process to require preclearance under the Act. The

decision of the court below reverses a quarter-century of successful civil rights enforcement.[2]

Prior to the voting changes at issue in this case, the Russell and Etowah County Commissioners were elected at large from residency districts. These residency districts were concurrent with the commissioners' jurisdiction over road operations in the counties. As a result of litigation in both counties, the at-large system of electing county commissioners was replaced by a single member district system. In both counties, this resulted in the election of African American representatives to the County Commissions.

Before the disputed changes, each County Commission adopted an annual budget for the entire county that allocated funds for road and bridge maintenance among the commissioners' individual districts in roughly equal amounts. Each commissioner had complete discretion to set priorities

---

[2]The Voting Rights Act has been considered one of the most successful pieces of civil rights legislation in this country's history. Its success is based in large part upon its regulatory scheme which has shifted the burden of time and inertia from the victims of discrimination to the perpetrators of that evil. *Katzenbach*, 383 U.S. at 327; Days & Guinier *Enforcement of Sections of the Voting Rights Act* in MINORITY VOTE DILUTION 167, Davidson, ed (1984).

and allocate funds for road and bridge work in his or her county. Each commissioner exercised sole management authority over the operations of his or her own road crew. Thus, like states that receive federal block grant money, each commissioner had a free hand to respond to constituents' needs in determining budget priorities.

The three enactments here at issue changed these operating procedures in both counties. In Etowah, the Common Fund Resolution[3] worked in tandem with the Road Supervision Resolution[4]. Directly after the election of the first African American commissioner, it created a system in which commissioners who once exercised exclusive control over their districts were submerged within a white majority that now exercised effective control of all decisions concerning road and bridge work throughout the county. In Russell County, the change that divested the commissioners

[3]The resolution stripped the commissioners of individual budgetary discretion within their residency districts, and vested that authority in the incumbent-dominated body as a whole.A-19

[4]The resolution reserved the authority of the incumbent commissioners to jointly oversee all work in the county. A-20.

of authority over road operations and reposed it in the appointed county engineer had essentially the same effect.

As to the Etowah County changes, the court below held that the Road Supervision Resolution had the potential for discrimination. However, the court ruled that the Common Fund Resolution was not covered under §5. A-19. In addition, the court below held that the reallocation of authority in Russell County did not effect a change in the potential for discrimination against minority voters.

This appeal ensued.

I. The District Court Erred in Exempting from §5 Preclearance the Changes in Authority Within the Russell and Etowah County Commissions on the Ground that Such Changes Were *De Minimis*.

A. There is no *de minimis* exception to §5

Section 5 requires covered jurisdictions to seek preclearance, before implementation, of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. §1973c.[5] Two basic enforcement principles have been drawn from this language. First, §5 admits of no exceptions; in covered jurisdictions, *all* changes affecting voting must be federally approved. *Id.*, *Allen v. State Bd. of Elections*, 393 U.S. 544, 568 (1969). Second, the burden of reporting voting changes is on the covered jurisdiction. Submissions must be made

[5] Section 4(b) of the Act sets out the criteria by which jurisdictions are designated for federal supervision. Etowah and Russell Counties are both covered jurisdictions under the Act. They are covered in part because of the State of Alabama's "unrelenting historical agenda, spanning from the late 1800's to the 1980's to keep its black citizens economically, socially, and politically downtrodden, from the cradle to the grave." *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1357 (1986). Nine of the states that are covered in their entirety are states of the former Confederacy. Thirteen other jurisdictions are covered in part.

in an "unambiguous and recordable manner" with a request for consideration pursuant to the Act. *Allen*, 393 U.S. at 571.

The main obstacle to the government's early efforts to enforce the fifteenth amendment was the conduct of state officials who resorted to the "extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." Thus, Congress sought to create a stringent mechanism to address all potentially discriminatory enactments, even those in unanticipated forms whose impact on the political process nevertheless could be significant. *White*, 439 U.S. at 47.

Section 5 was one of the "array of potent weapons" Congress mobilized against the "insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *Katzenbach*, 383 U.S. at 337, 309. Congress recognized that for over 100 years, government attempts to enforce the fifteenth amendment's protections against race-based voting discrimination through case-by-case litigation

had been unsuccessful. *Id.*, at 313; *White*, 439 U.S. at 37.

Congress set up an enforcement scheme whereby all new voting practices in covered jurisdictions would be suspended until the jurisdiction obtained either a declaratory judgment from the District of Columbia District Court or a failure to object by the Department of Justice indicating that the new voting procedures had neither the purpose nor the effect of racial discrimination. *Katzenbach*, 383 U.S. at 317. By suspending all new voting changes before implementation, Congress "shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victims." *Id.*, at 327; *See* footnote 2, *supra*. This "uncommon exercise of Congressional power" was justified by the exceptional conditions found in the covered jurisdictions. *Id.*, at 334.

From this history, it is clear that §5's enforcement mechanism is an intricate and carefully balanced scheme that cannot function without rigorous voluntary compliance from the states. Just last term, this Court reaffirmed this bedrock concept, rejecting a lower court decision that

sought to diminish covered jurisdictions' compliance responsibilities while creating "incentives for them to forgo the submission process altogether." *Clark v. Roemer*, 59 U.S.L.W. 4583, 4586. The rule created by the district court embraces the narrow vision of §5 that was rejected last term in *Clark*.

A local district court[6] faced with a challenge to a jurisdiction's failure to preclear a voting change under §5 is forbidden from making any determination as to the discriminatory purpose or effect of that change. The sole inquiry before the local court is "whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement." *Allen*, 393 U.S. at 561. The three-judge district court in this case articulated the proper standard, noting that its inquiry was limited to the coverage issue, *Ed Peter Mack, Nathaniel Gosha, III, and Lawrence C. Presley, individually and on behalf of others similarly situated v. Russell County Commission and Etowah County Commission*, No.

---

[6]The statute authorizes the convening of three-judge courts to hear such claims. 42 U.S.C. §1973b.

89-T-459-E, slip op. (M.D. Ala., August 1, 1990), A-8[7]. However, it failed to apply this standard when it held that the changes at issue, though arguably changes that affected voting, were beyond the reach of §5.[8] A-16, A-19.

The court below created a novel exception to the statutory scheme, claiming that either no discrimination would result from the changes in question or that any such discrimination would be *de minimis*. A-17 n.15, A-19. This "*de minimis* exception" to §5 completely disregards the statute's express mandate that all voting changes in covered jurisdictions be precleared, 42 U.S.C. 1973c, and threatens to undermine the voluntary compliance mechanism of the Act's enforcement scheme in two critical ways. First, a *de minimis* exception would allow local district courts to intrude upon the exclusive authority of the District of Columbia District Court and the Attorney General to make

---

[7]The unpublished opinion in these cases appears in the appellants' Appendices to the Jurisdictional Statements. Citations to this opinion throughout will refer to the Appendix to the Jurisdiction Statement in *Presley v. Etowah County*, No. 90-711.

[8]Of the three changes originally challenged by appellants, the district court found that the shift in administrative authority of the Etowah County Road Commission -- which stripped administrative control for the road district from the seat won by the African American directly following his election -- was covered by §5. A-20.

substantive determinations regarding discrimination under §5. Second, as a practical matter, the inevitable effect of this categorical exception will be to throw open to covered jurisdictions the determination as to which voting changes should be submitted for §5 review.

This Court has held §5's preclearance requirements to be "all inclusive of any kind of practice," covering state enactments that alter the election law of a covered state in even a minor way. *Allen*, 393 U.S. at 566. Whether subtle or obvious, changes that affect voting are within the statute's reach. *Id.*, at 565. Under §5, no covered jurisdiction may enforce a change affecting voting without obtaining prior approval. *White*, 439 U.S. 32. *See United States v. Sheffield Board of Commissioners*, 435 U.S. 110 (1978); *Perkins v. Matthews*, 400 U.S. 379 (1971); *McDaniel v. Sanchez*, 452 U.S. 130 (1981).

The Court has recognized that §5 reaches all changes that have potential impact on the political system. Thus, candidate filing periods, *NAACP v. Hampton County Election Comm.*, 470 U.S. 166 (1985); personnel policy changes affecting candidates' ability to run for office, *White*,

439 U.S. 32; bulletins from a state election board outlining methods of casting absentee ballots, *Allen, supra*; and the rescheduling of candidate qualifying periods, *Hadnott v. Amos,* 394 U.S. 358 (1969) have all been found to require preclearance. *See also, Huffman v. Bullock County,* 528 F. Supp. 703 (M.D. Ala. 1981)(changes in office administration policies that shift the burden of paying support staff salaries to elected official are subject to §5 because such changes increase financial burdens on elected official and discourage African Americans from seeking office).

In *White,* the change at issue was a rule requiring school board employees to take unpaid leaves of absence when running for political office. The Dougherty County Board argued that the rule was a mere personnel policy aimed at guarding against absenteeism among its employees. 439 U.S. at 40. Noting that the policy only affected political candidates and not other potential absentees, this Court held that the change was an "obstacle to candidate qualification" and thus was a covered change within the language of §5. *Id.,* at 43.

The disputed change in *NAACP v. Hampton County Election Commission, supra,* was a modification in the date of election and the candidate filing period. The State of South Carolina contended that the change, made in an attempt to respond to an objection to an earlier voting change by the Department of Justice, was merely a ministerial action taken to comply with the Department's requirements. 470 U.S. at 174. This Court observed that the filing period could not be viewed in isolation from the election of which it was a part. It held that the prolonged filing period created by South Carolina had the "potential to hinder voter participation," as did the change in the election date to no longer coincide with the general election. It ruled that both changes were covered under the Act. *Id.,* at 178.

The district court erred in creating a *de minimis* exception to §5 coverage. As explained below, Congress did not intend to create any exceptions to the Act.

1. Congress Repeatedly Has Explicitly Rejected Attempts to Create *De Minimis* Exceptions to §5's Coverage.

In order fully to effectuate the enforcement mechanism of the statute, this Court has interpreted §5, from its inception, so as to afford it "the broadest possible scope". *Allen*, 393 U.S. at 576. *NAACP v. Hampton County Election Commission*, 470 U.S. at 176; *Georgia v. United States*, 411 U.S. 526, 533 (1973); *White*, 439 U.S. at 46. If Congress had disagreed with this Court's broad interpretation of §5, lawmakers were free, when they renewed the Act in 1970, 1975 and 1982, to amend the statute in accordance with a more limited purpose. Instead, each time §5 has come up for renewal, it has been reenacted without substantive limitations. By these actions, Congress has made clear its continuing commitment to subject "all changes, regardless of how small," to §5 scrutiny. *Allen*, at 568.

Far from authorizing any exemptions from §5's coverage, Congress repeatedly has expressly *rejected* proposals to exclude even minor voting changes from the reach of the Act. For example, during the debate over passage of the 1965 Act, the suggestion was made that

certain types of minor changes, such as changing from paper ballots to voting machines, could be exempt from preclearance without undermining the remedial purposes of the Act. *Allen*, 393 U.S. at 568. However, the Attorney General warned that "precious few" exceptions would be allowed under §5 because "an awful lot of things . . . could be started for the purposes of evading the 15th amendment if there is the desire to do so." Ultimately, Congress chose not to exempt even minor changes from the reach of the Act. *Id.*; *Perkins v. Matthews*, 400 U.S. 379, 387 (1971).

Similarly, during the 1981 Voting Rights Act extension hearings before the House of Representatives, limits were proposed on the categories of changes subject to Section 5. The rationale offered was that requiring preclearance of trivial changes was a burden to the covered jurisdictions and to the Justice Department. Proponents of the limits also argued that Section 5 had been read in such unpredictably broad ways that jurisdictions could no longer discern its boundaries. By amending the statute so as to enumerate the categories of changes requiring preclearance, these proponents sought to limit the scope of Section 5.

Rejecting these proposals, the House Judiciary Committee wrote:

> It has also been suggested that the types of electoral changes subject to preclearance review should be limited. For example, only those changes which have produced the most objections from the Justice Department. While some changes may adversely affect a greater number of people, others may have precisely the type of discriminatory impact which Congress sought to prevent, even though the numbers involved are smaller. . . . The lesson which both Congress and the courts learned from the pre-1965 litigation experience is that jurisdictions did not limit their efforts to discriminate to one type of voting practice. 'The discriminatory potential in seemingly innocent or insignificant changes can only be determined after the specific facts of the change are analyzed in context. The current formula allows for such factual analysis.'

1981 HOUSE REPORT 34-35 (quoting and paraphrasing the testimony of former Assistant United States Attorney General Drew Days, 1981 HOUSE HEARINGS 2122). Responding to similar arguments, in 1982 the Senate also rejected attempts to limit the scope of §5. Instead, it reaffirmed its commitment to apply §5 to *all* changes and went even further to enact penalties for local jurisdictions who failed to submit even arguably *de minimis* changes for §5 review. 42 U.S.C. §1973b.[9] Thus, Congress declined to

[9]This section provides that a jurisdiction may bail out of §5 coverage if the United States District Court for the District of Columbia determines that during the ten years prior to the filing of an action for declaratory judgment, and during the pendency of the action, "such state or political subdivision and all governmental units within its territory have complied with Section 5 of this Act, including the requirement that *no change covered by section 5 has been enforced without preclearance under section 5.* . . .)(emphasis added); *See also,* S. Rep. No. 417, 97th Cong., 2d Sess. (1982) at 48 (noting that "if bail-out were not made dependent on record of timely submissions, there would be no incentive for jurisdictions to take seriously that requirement."

limit the range of changes subject to §5 preclearance, properly leaving the emphasis of §5 enforcement on whether the jurisdiction, and not the change, is covered. *See* Days and Guinier, *Enforcement of Section 5 of the Voting Rights Act,* in MINORITY VOTE DILUTION 173 (C. Davidson, ed. 1984)(hereafter cited as "Days and Guinier").

2. A *De Minimis* Exception to §5 Coverage Would Render The Self-Reporting Requirement of the Act Ineffective

Section 5's enforcement mechanism depends on a clear division of labor between the federal government and the covered jurisdictions. The covered jurisdiction is required to submit all voting changes for preclearance and the Attorney General must review those submissions to determine if there is a discriminatory impact. Congress has determined that this scheme of comprehensive reporting is the most effective way to implement its enforcement goals. *Clark v. Roemer,* 59 U.S.L.W. at 4586; *McDaniel v. Sanchez,* 452 U.S. 130, 151 (1981)("The prophylactic purposes of the §5 remedy are achieved by automatically requiring review of *all* voting changes prior to implementation by the covered

jurisdictions.")(internal quotation marks omitted); *McCain v. Lybrand,* 465 U.S. 236, 248 (1984), ("Enforcement of the Act depends upon voluntary and timely submission of changes subject to preclearance.") This determination was made in view of the Attorney General's limited resources and Congress's anticipation that the Attorney General would be unable to discover independently all changes with respect to voting enacted by covered jurisdictions[10].

In order to effectuate Congress's enforcement scheme, the Attorney General has enacted regulations governing the implementation of the Act. The breadth of these regulations makes clear that there are no exceptions to §5 coverage:

28 C.F.R. §51.12 Scope of requirement

> Any change affecting voting, even though it appears minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the section 5 preclearance requirement

---

[10]*See* Days and Guinier at 168 (Even during periods of rigorous enforcement, Department of Justice was unable to ensure that all voting changes were submitted because of lack of adequate resources to canvass changes, obtain compliance with preclearance procedures or ascertain whether submitting jurisdictions had complied with objections).

As the official charged with primary responsibility for enforcement of the Act, the Attorney General's interpretation of the Act is entitled to considerable deference. *See e.g., Sheffield Board of Comm'rs,* 435 US at 131, (deference should be accorded to Attorney General's construction of the Act, especially in light of the extensive role played by the Attorney General in drafting the statute and explaining its operation to Congress); *White,* 439 U.S. at 39, 58 L.Ed 2d 289, 99 S.Ct. 368.

The all-inclusive preclearance rule of §5 is based in part on Congress's and the Attorney General's recognition of a long history of noncompliance among the covered jurisdictions. The 1982 Senate Report observed that

> The extent of non-submission documented in both the House hearings and those of this Committee remains surprising and deeply disturbing. There are numerous instances in which jurisdictions failed to submit changes before implementing them and submitted them only, if at all, many years after, when sued or threatened with suit.
>
> . . . .
>
> Put simply, such jurisdictions have flouted the law and hindered the protection of minority rights in voting.

S. Rep. No. 417, 97th Cong., 2d Sess. at 47-48. *See also, NAACP,* 470 U.S. at 175, n. 19. (The "prevalence of changes that were implemented without preclearance" as a "prime concern of Congress when it extended the Voting Rights Act in 1982.") This Court has recognized that noncompliance among the covered jurisdictions poses a serious threat to §5 enforcement. *Perkins,* 400 U.S. at 389[11]. A *de minimis* exception to §5 coverage would exacerbate that threat by further weakening compliance by the covered jurisdictions. This is because the practical effect of a *de minimis* exception that allows courts to decide that certain changes are inconsequential under §5, is to expand the discretion of covered jurisdictions to decide that certain changes are not within the Act and need not be submitted.[12] A *de minimis* exception thus would "permit[] circumvention

[11] In *Perkins* this Court observed:
The history of white domination in the South has been one of adaptiveness, and the passage of the Voting Rights Act and the increased black registration that followed has resulted in new methods to maintain white control of the political process. 400 U.S. at 388.

[12]Jurisdictions under preclearance are subjected to the rigorous requirements of the Act precisely because of a documented history of egregious abuses of voting rights and abuse of discretion. *See Katzenbach, supra*; *Allen, supra*.

of the requirement that itself was designed to eliminate circumvention of the goals of the Act." *McCain v. Lybrand,* 465 U.S. at 249.

B. Even if there were a *de minimis* exception, fundamental changes in the authority of an elected official potentially dilute minority votes and are not *de minimis* changes.

The enactments at issue in this case stripped a newly elected African American official of the authority he was elected to exercise. As a result, the votes of minority voters who elected these officials were rendered virtually meaningless. The court below, however, held that the fundamental diminution of the duties of the African American voters' representative had "no obvious relation to voting rights,"[13] and was not subject to §5.

In announcing this rule, the district court made two errors. First, it went beyond the issue of §5 coverage to examine the merits of the change. As discussed in Point I of the appellants' brief, the court below overstepped its jurisdiction. The consideration of substantive issues of

[13]The basis of the district court's conclusion was that no change had occurred in the constituencies of the officials among whom authority was reallocated. This issue is discussed in Point II *infra*.

discrimination properly is left to the District Court of the District of Columbia or the Attorney General.

Second, the court below misapplied the "potential for discrimination" standard for §5 coverage by disregarding the potential the disputed changes had to diminish African American voters' opportunity to cast a meaningful vote. Under the proper inquiry, which seeks to determine whether, under any circumstances, the changes at issue had the potential for discrimination, the disputed changes are covered by §5.

The purpose and structure of §5 demonstrate that Congress intended the Act to cover changes in the authority of elective office that have the potential to dilute minority voting strength.[14] Congress explicitly condemned attempts to diminish African American voting strength by fundamentally altering elective offices. These attempts

[14]Congress enacted §5 as a "mechanism for coping with all potentially discriminatory mechanisms whose source and forms it could not anticipate, but whose impact on the electoral process would be significant." *White*, 439 U.S. at 47. As such, the Act's purpose has always been to prevent implementation of ever more sophisticated methods of obstructing African American voting rights. S.Rep. No. 417, 97th Cong., 2d Sess. (1982). Section 5 covers changes that affect the "power of the citizen's vote" as well as those that "undermine the effectiveness of voters." *Allen*, 393 U.S. at 569.

include: 1) extending the terms of offices held by white incumbents to avoid challenges by African Americans; 2) abolishing offices sought by African American candidates[15]; and 3) making local elective offices appointive in predominantly black counties but not in predominantly white counties. *See* 116 Cong. Rec. 6357 (daily ed. March 6, 1970)(Remarks of Sen. Bayh). Aware that local officials were employing these obstructionist tactics to dilute minority voting strength, Congress acted promptly in 1970 and again in 1975 to renew the Act.[16] In 1982, Congress

[15] Within a few days after an African American candidate qualified to run for justice of the peace to fill a vacancy in his district, county commissioners in Baker County, Georgia, voted to consolidate all militia districts into one district. "The effect was to abolish the one office for which a Negro had filed." 116 Cong. Rec. 6357 (daily ed. March 6, 1970)(Remarks of Sen. Bayh).

[16]Since the Act's inception, lawmakers repeatedly have expressed their intention that its provisions protect against attempts to diminish minority voting strength. *See, e.g.*, 111 Cong. Rec. 8363 (daily ed. April 23, 1965) (statement of Sen. Javitts)("The right to vote is the cornerstone of our democratic society. A citizen's respect for law rests heavily on the belief that his voice is heard, directly or indirectly in the creation of law.) *Id.*, at 38493 (Remarks of Rep. Ryan)(Work needs to be done to enable black citizens to share political power in communities where they are not an absolute majority); 121 Cong. Rec. 24111 (daily ed. July 22, 1975)(Remarks of Sen. Tunney)("I don't think that there is anything more fundamental to our political process than the right to vote. I would couple the right to vote in order of importance with the right of free speech and the right to make one's views known. But it does not do any good to the right to make your views known if you do not have

again renewed §5's protections precisely because it recognized that the potential for discrimination persists in changed voting practices despite the increasing number of African American elected officials.[17]

This Court has affirmed this clear congressional intent. In *Bunton v. Patterson*, a companion case to *Allen v. State Bd. of Elections, supra,* it held that changes that

---

the power to do anything about it, or if you do not have the ability to elect those officials who are going to govern your life. . . . The Voting Rights Act is, if nothing else, . . . an invitation to all Americans to participate in the process of government. . .).

[17]The potential for discrimination inheres in changes in the authority of elected officials because such changes affect the officials' ability to carry out the instrumental functions of government that they were elected to perform. When minority representatives' ability to carry out their functions is inhibited, the ballots cast in their support are diminished and the voters are powerless to address the effects of continued exclusion from government. The House Report that accompanied the 1982 amendments to the Act specifically addressed lawmakers's intention that §5 protect minority voters against continued exclusion from government. The report noted that:

> The observable consequences of exclusion from government to the minority communities in the covered jurisdictions has been (1) fewer services from government agencies, (2) failure to secure a share of local government employment, (3) disproportionate allocation of funds, location and type of capital projects, (4) lack of equal access to health and safety related services, as well as sports and recreational facilities, (5) less than equal benefit from the use of funds for cultural facilities, and (6) location of undesirable facilities, e.g., garbage dumps or dog pounds, in minority areas.

H. Rep. No. 227, 97th Cong., 1st Sess. 14 (1981).

fundamentally alter the authority of elected African American representatives have the potential to dilute African American voting strength and thus are covered by §5. In *Bunton v. Patterson,* the Mississippi legislature abolished an elected county office, converting it to an appointed position. This Court held that the change potentially diluted African American voting strength because citizens could no longer elect a county official who was subject to voters' approval. 393 U.S. at 570. It therefore held that the change was covered by §5.

The *Allen* court recognized that §5 covers certain changes in the authority of elective offices that have an impact on minority voting strength. It cited as an example of such a change the incident described in Congressional testimony by Attorney General Katzenbach. Attorney General Katzenbach described the case of a school board that was ordered by a federal court to comply with the 1957 Voting Rights Act, but was then immediately stripped of all authority and funding to achieve compliance by the state legislature. *See id.,* at 568 (citing testimony of Attorney General Katzenbach). Similarly, courts have held that §5

covers manipulations that bar participation by minority voters' representatives. *See Hardy v. Wallace,* 603 F. Supp 174 (N.D. Ala. 1985)(Following election of first African American legislative delegation for county, authority to appoint head of county racing commission transferred from local delegation to governor).

Indeed, if a legislature passed a kind of "grandfather clause"[18] that barred from participation in legislative debate any legislator who had not been in office before the election of the first African American legislator, such a change would be covered by §5. *Cf. Hardy v. Wallace,* 603 F. Supp. 174. Likewise, if a state legislature fearing an African American opponent in a local government election extended the white incumbent's term of office by several years, the change would be covered. *See* 116 Cong. Rec. 6357 (Daily ed. March 6, 1970)(comments of Sen. Bayh).

The foregoing changes render African American votes for representatives of their choice meaningless because the changes subvert the representatives' authority to carry out

[18] *See Guinn v. United States,* 238 U.S. 347 (1914).

the mandates they were elected to discharge. Such changes are the functional equivalents of "white primaries" which were used historically to obstruct African American voting rights. After white primaries were instituted, although African Americans still had the formal right to vote, their exclusion from critically important election contests rendered their votes meaningless. This Court long ago established that such an abridgement of African American voting rights is illegal. *Smith v. Allwright,* 321 U.S. 649 (1944), *Terry v. Adams,* 345 U.S. 461 (1953).

The decision of the lower court clearly conflicts with this Court's direction. Although the court lacked jurisdiction to decide the actual discriminatory effect of the disputed changes, it was obliged to determine whether those changes had any conceivable potential to dilute African American voting strength. It erred in this analysis. In Russell County, the court below held that because the official responsible for road operations both before and after the disputed change was elected by, or responsible to, the voters of the entire county, there was "no significant change in the influence wielded by the voters of any

district." A-17. This analysis fails to recognize that the voters' right to cast a meaningful ballot was potentially diminished because they no longer directly elected the official in charge of road operations. Had the change, from election to appointment, in the method of selecting the county engineer from election to appointment not occurred in Russell County, voters would have been able to elect an official responsible for road operations who was directly accountable to them. As a result of the changes occurring, even after African Americans obtained the ability to elect a road commissioner, this ability became meaningless because the commissioner had been stripped of his authority. Had the change not occurred, voters could have: 1) held the elected officials directly accountable for unpopular policy choices by voting for his/her opponent in the residency district--the county engineer is insulated from such direct responsibility to the voters; 2) had greater access to the road commissioner within their residency district and been able to lobby him/her to use his/her exclusive budgetary authority within the district to support policy choices--now all budgetary decision making and allocations

are centralized; 3) had direct input into the selection of the official responsible for road and bridge operations in the county--now they have indirect input, if any input at all, into the selection of the county road official.

The court below also held that the adoption of the Common Fund Resolution would have a negligible effect on minority voting strength because it did not change the allocation of overall budget authority to the commission as a whole. However, like voters in Russell County, voters in Etowah County potentially had their voting strength significantly diminished with the restructuring of the commission's budgetary authority. After the change: 1) voters could no longer elect from their residency district an official who had complete discretion over road and bridge funds in the district; 2) even if they convinced their representative to support a particular project, the commission as a whole could exercise veto power over the individual commissioner's choice; and 3) voters elected officials who had diminished bargaining power because they no longer had the ability to set district priorities individually

and "horsetrade" with other commissioners for their preferred projects.

II. The District Court Erred in Holding That Reallocations of Power Among Elected Officials Must Involve Changes in Constituency in Order to Come Within §5's Coverage.

The court below created a second impermissible exception to §5 coverage when it held that reallocations of authority among elected officials would only be subject to §5 scrutiny if they "effect a significant relative change in the powers exercised by governmental officials elected by, or responsible to, substantially different constituencies of voters."[19] A-13-14. Section 5's scope does not rest on an analysis of the relative effect of voting changes among particular constituencies. The holding of the court below is wrong as a matter of law.

This Court has made only one express pronouncement about §5 coverage of reallocations of authority among elected officials. In *McCain v. Lybrand*, 465 U.S. 236

[19]The attempt of the court below to analyze the relative effects of the voting changes was another impermissible foray into the substantive discrimination issues that are reserved for the District of Columbia Circuit Court and the Department of Justice.

(1984), this Court noted that the "basic reallocation" of authority from the old county board to the new county council would be a covered voting change under the Act. Under the old county board system, the county was effectively governed by the local legislative delegation, with certain limited authority reserved to the county board. The old county board was comprised of three members, two of which were appointed by the local legislative delegation. The third member was elected at-large from the county. The new structure called for the at-large election of all members of the 5-member governing body.

Nothing in this Court's decision in *McCain* suggests that a change in the constituencies of the elected officials is a necessary prerequisite to §5 coverage. The Court's conclusion rests squarely on the fact that the restructuring caused fundamental changes in the function and powers of the governing board. 465 U.S. at 239 (1984) ("The Act created a new form of government for [the] County, altering the county's election practices."). In addition to the change in the function and powers of the board, the Court noted three additional grounds for §5 coverage. None of the

Court's reasons even remotely relied on a change in constituency theory.[20]

Moreover, none of the cases cited by the district court supports its rule that reallocations of authority among elected officials will only be subject to §5 if they involve a change in constituency. *See Horry County v. United States,* 449 F. Supp. 990 (D.D.C. 1978); *County Council of Sumter County v. United States,* 555 F. Supp. 694 (D.D.C. 1983)[21]; *Hardy v. Wallace,* 603 F. Supp. 174 (N.D. Ala. 1985)[22] and

[20]The Court suggested that the restructuring also could be covered under §5 because it: a) altered the office terms of the elected officials; b) altered the method of selecting certain officials from appointment to election; and c) created a residency requirement for county council members.

[21] In *Sumter County*, the district court rejected the theory -- virtually identical to the one advanced by the district court here -- that a restructuring of local government was beyond the scope of §5 because the constituencies of the old and new governing bodies did not change. The *Sumter County* court rejected this approach as "facile" because it ignored the *de jure* changes in the county's governing structure caused by the restructuring. Contrary to the interpretation of the district court in this case, the *Sumter County* court's holding did not rest on an analysis of the effect of the change on various constituencies. The *Sumter County* court based its holding on the simple fact that the "*de jure* scheme was unarguably altered . . . and constitutes a change cognizable under §5 of the Act." 555 F. Supp. at 702.

[22]The *Hardy* court found §5 applicable to the changes in issue principally because the changes reversed the scheme of local voter oversight over a governing body that controlled over 63% of the total county revenue. The *Hardy* court noted that divesting the local legislative delegation of its authority to appoint the head of the body, and transferring the authority to the governor, had the potential to dilute African American voting strength. 603 F. Supp. at 179.

Robinson v. Alabama State Dept. of Educ., 652 F. Supp. 484 (M.D. Ala. 1987)[23]. To the contrary, *Horry County,* the lead case relied on by the district court, explicitly held that a change in the duties of an elected official, without any change of constituency, was a change subject to §5. 449 F. Supp. at 995.[24] *Horry* was decided by a District of Columbia district court. Given the unique role played by that court in enforcing §5, its interpretation should be given great deference. *Katzenbach,* 383 U.S. 301; *Georgia v. United States,* 411 U.S. 156.

Changes that fundamentally alter the authority of an elective office have a *per se* impact on the electoral process and expressly come within §5's ambit. This rule is supported by the Attorney General's regulations for implementing §5. Those regulations expressly state that any changes in the "term of an elective office or an elected

[23]While the *Robinson* court held that the change in the constituency that elected the two bodies was one basis for requiring preclearance, the court found that the change in the method of selecting the board was an independent ground for subjecting the plan to §5 scrutiny. 652 F.Supp. at 486.

[24]The *Horry* court held that the new duties of the chair were "sufficiently different [to] constitute[] a change in electoral practice requiring preclearance under §5. *Id.*, at 995.

official or in the offices that are elective" are covered under the Act. 28 C.F.R. §51.13(i)

The changes at issue in this case are covered changes within the meaning of §51.13. The change that stripped the Russell county commissioners of their sole discretion to supervise the roads and bridges in their districts fundamentally changed the ways in which those officials exercised their authority and performed their administrative duties and unarguably was a "change in the offices that are elective. Likewise, the change in the fiscal autonomy of the Etowah county commissioners, and the decision to require that all road work be conducted through the existing four road shops, unarguably worked fundamental changes in the way the commission conducted business and thus was a "change in the office that is elective" as well. Whether within the language of the regulations or the statute itself, the changes at issue in this case are subject to §5.

Conclusion

For the reasons discussed herein, amicus respectfully urges this Court to reverse the holding of the trial court that the disputed changes are not covered by §5, and remand the cause to the district court for further proceedings.

Respectfully submitted,

JULIUS L. CHAMBERS
CHARLES STEPHEN RALSTON
DAYNA L. CUNNINGHAM
(Counsel of Record)
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
99 Hudson Street,
16th Floor
New York, N.Y. 10013
(212) 219-1900

Attorneys for Amicus Curiae